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Supreme Court, U.S.
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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BERTRAM E. LACEY,

Petitioner,

v.

THE DOW COMPANY, D/B/A
DOW CHEMICAL U.S.A.

Respondent.

Petition For A Writ of Certiorari
The The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Civil Rights Act of 1991 apply to cases pending at the time of its enactment? (A question upon which certiorari has been granted in *Landgraf v. U.S.I Film Industries*, No. 92-757 and *Rivers v. Roadway Express*, No. 92-938.)

2. Was petitioner constructively discharged from his employment as the result of the racial discrimination found to have been committed in violation of Title VII of the Civil Rights Act of 1964?

PARTIES

All of the parties to this action are listed in the caption.

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BERTRAM E. LACEY,

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THE DOW COMPANY, D/B/A
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Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Bertram E. Lacey, respectfully prays that a writ of certiorari be granted to review the decision of the court below, that the decision be reversed and the case remanded for further proceedings.

OPINIONS BELOW

The opinion of the Fifth Circuit is unreported and is set out at pp. 1a-4a of the appendix hereto ("App."). The orders of the United States District Court for the Middle District of Louisiana adopting the Report of the Magistrate Judge are unreported and are set out at pp. 5a-7a of the

appendix. The Report of the Magistrate Judge is unreported and is set out at pp. 8a-40a of the appendix.

JURISDICTION

The decision of the Fifth Circuit was entered on February 26, 1993. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).[1]

STATUTES INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, which provides in pertinent part:

SEC. 2000e-2. UNLAWFUL EMPLOYMENT PRACTICES

(a) Employer practices. It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of

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[1]Petitioner, acting *pro se*, filed a motion in the court below out of time for an extension of the time in which to file a petition for a rehearing. The court of appeals granted the motion, and a petition for rehearing was filed but has not yet been acted upon. Because of the uncertainty of whether the motion and the petition are sufficient to toll the time for seeking certiorari here, this petition is filed within ninety days from the date of the decision of the court of appeals.

> employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

This case also involves sections 101, 102, 109(c) and 402 of the Civil Rights Act of 1991, which provide in pertinent part:

SECTION 101: PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes (42 U.S.C. § 1981) is amended —

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end the following new subsections:

> "(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relation.
>
> "(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

SEC. 102. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section:

> "SEC. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT.

"(a) RIGHT OF RECOVERY.—

"(1) CIVIL RIGHTS.—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

* * *

"(b) COMPENSATORY AND PUNITIVE DAMAGES—

"(1) DETERMINATION OF PUNITIVE DAMAGES.—A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

"(2) EXCLUSIONS FROM COMPENSATORY DAMAGES.—Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

"(3) LIMITATIONS.—The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of

life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

* * *

"(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

"(4) CONSTRUCTION.—Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981).

SEC. 109. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

* * *

(c) APPLICATION OF AMENDMENTS.—The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

SEC. 402. EFFECTIVE DATE.

(a) IN GENERAL.—Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

(b) CERTAIN DISPARATE IMPACT CASES.—Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

STATEMENT OF THE CASE

A. The Proceedings Below

This action began on October 19, 1989, when petitioner Bertram E. Lacey, plaintiff below, filed an action alleging violations of both Title VII of the Civil Rights Act of 1964 and of 42 U.S.C. § 1981. It was alleged that the respondent Dow Chemical Co., defendant below, had discriminated against petitioner in employment decisions because of his race, African American, during the period 1985-88.

On December 20, 1990, the district court judge dismissed the claim under section 1981 based on the decision of this Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The Title VII claim was referred to a Magistrate Judge to act as a Special Master for a report and recommendation. After an evidentiary hearing, the Magistrate Judge filed a report recommending a finding for the defendant and dismissal of the plaintiff's complaint. As set out more fully below, the Magistrate Judge found that the petitioner had been subjected to unlawful employment discrimination, but was entitled to no relief because he had left the employment of the respondent and had failed to establish that he had been constructively discharged. Moreover, he had not been denied any promotions as a result of the discrimination he had suffered. Since the claim under § 1981 had been dismissed, there was no entitlement to damages; and, since plaintiff had entered medical school upon leaving Dow's employment, he had failed to mitigate damages and was not entitled to any back pay. App. p. 39a.

Petitioner filed objections to the report, but, on July 20, 1992, the district court summarily adopted the report and entered judgment in favor of the defendant. App. pp. 5a-6a. An amended judgment was entered on August 17, 1992 (App. p. 7a), and timely notices of appeal were filed to the Fifth Circuit.

In the court of appeals, petitioner raised a number of issues, including whether the evidence support a finding that the petitioner had been constructively discharged and:

> Do the provisions of sections 101 and/or 102 of the Civil Rights Act of 1991 apply to cases pending at the time of its enactment.

Brief for Plaintiff-Appellant in the Court of Appeals, p. 1. In his brief, petitioner acknowledged that the Fifth Circuit had already decided the question of the applicability of the Civil Rights Act of 1991, specifically citing the decision in *Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992). *Id.* at 15. The brief went on to note that a petition for a writ of certiorari had been filed in *Landgraf* in this Court (No. 92-757) and that a ruling on that petition was expected soon. *Id.*

The court of appeals entered an order affirming the decision of the district court without hearing oral argument. The decision was handed down on February 26, 1993, four days after this Court had granted the petitions for writs of certiorari in *Landgraf* and in *Rivers v. Roadway Express*, No. 92-938. However, the Fifth Circuit did not mention in its decision the grants of certiorari or otherwise note the pendency in this Court of the issue of the applicability of the Act to pending cases. (App. pp. 1a-4a.)[2]

B. Statement of Facts

In his Report the Magistrate Judge made a number of findings of fact, most of which were favorable to petitioner. In so doing, he rejected most of the testimony by the witnesses for respondent as vague, confusing, contradictory, and not credible. App. p. 9a. The Magistrate Judge found that petitioner's immediate supervisor, Andy

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[2]See note 1, *supra*.

Rolf, had assigned petitioner lower than proper performance ratings because petitioner was an African American. App. p. 37a. He also found that the ratings had been relied upon by higher-ups in the company. App. p. 29a. He further found that a number of managers, including Dow's counseling specialist, the Equal Employment Opportunity manager for the Louisiana Division, and an area Equal Employment Opportunity Coordinator, told petitioner that there was discrimination at Dow. App. pp. 17a-24a. Of great significance, petitioner was told that "'the handwriting [was] on the wall — these people intend to get you out of Dow Chemical one way or the other.' They were not going to promote the [petitioner] and there was nothing he could do." App. p. 23a.

Despite the specific findings of direct evidence of racial discrimination, the Magistrate Judge concluded that he petitioner had not proven that he had been constructively discharged, because "the policies underlying Title VII are best served if, wherever possible, the unlawful discrimination is attacked within the context of the existing employment relationship." App. p. . Therefore, he was entitled to no relief under Title VII; the Magistrate Judge recommended that judgment be entered in favor of the defendant dismissing the plaintiff's complaint.

REASONS FOR GRANTING THE WRIT

I. THE ISSUE OF WHETHER THE CIVIL RIGHTS ACT OF 1991 APPLIES TO CASES PENDING AT THE TIME OF ITS ENACTMENT IS AN IMPORTANT ONE ON WHICH THIS COURT HAS GRANTED CERTIORARI

On February 22, 1993, this Court granted certiorari in two cases, *Landgraf v. USI Film Industries*, No. 92-757 and *Rivers v. Roadway Express*, No. 92-938, which raise the issue of whether the Civil Rights Act of 1991 should apply to pending cases. In addition, the Court is holding two other

cases raising this issue, *Johnson v. Uncle Ben's*, No. 92-737 and *Kuhn v. Island Creek Coal Co.*, No. 92-787, pending decision in *Landgraf* and *Rivers*. Since the present case presents issues virtually identical to *Landgraf* and *Rivers*, petitioner respectfully suggests that the appropriate action would be for this petition to be held pending decision in those two cases.

In *Landgraf* both the conduct complained of and the trial of the action occurred prior to the effective date of the Act. In *Landgraf*, as here, the district court held that the plaintiff had suffered from illegal discrimination, there in the form of sexual harassment, here in the form of discriminatory performance appraisals and other terms and conditions of employment. In both cases, relief was denied because the trial courts held that the plaintiff had failed to establish that she or he had been constructively discharged. Since no back pay was available, since injunctive relief would be inappropriate, and since damages were not available under Title VII, no relief was possible and the cases should therefore be dismissed.

If, in *Landgraf*, this Court holds that the damages provisions of section 102 of the Civil Rights Act of 1991 apply to cases pending at the time of its enactment, then the case would be remanded to the district court for determination of the amount of damages. In this case also, if section 102 of the Act applies, petitioner would be entitled to a remand for a determination of damages. Therefore, the outcome in *Landgraf* would control the outcome here.

In *Rivers v. Roadway Express*, the issue is whether the provisions of section 101 of the Act, which overturn the decision of this Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), should apply to cases pending at the time of its enactment. If this Court holds in the affirmative, *Rivers* would be remanded for a trial in which claims under the new Act would be presented. Similarly here, petitioner's claims that he suffered discrimination in the terms and

conditions of his employment were dismissed because of the decision in *Patterson*. Like *Rivers*, the conduct complained of occurred before the decision in *Patterson* and before the effective date of the Act. Also, like *Rivers*, the conduct violated Title VII's prohibition against discrimination in employment, and the issue is whether the additional remedy of money damages available under section 1981 should be available. Therefore, the result in *Rivers* will govern here. Indeed, petitioner would be entitled to a reversal of the decision below and remand if the Court holds that *either* section 101 *or* 102 of the 1991 Act should apply to pending cases.

For these reasons, petitioner respectfully suggests that it would be appropriate for this Court to retain the petition in this case until the decisions in *Landgraf* and *Rivers*.

II. THE STANDARDS FOR DETERMINING A CLAIM OF CONSTRUCTIVE DISCHARGE IN DISCRIMINATION CASES PRESENTS AN IMPORTANT ISSUE THAT SHOULD BE RESOLVED BY THIS COURT.

The decision of the Fifth Circuit held that petitioner had failed to make out even a prima facie case of racial discrimination because he failed to prove that he was constructively discharged. App. p. 4a. This holding was in the face of findings by the Magistrate Judge that his supervisor had rated his work poorly because petitioner was black, that other Dow supervisors relied on the supervisor's racially discriminatory assessments, and that Dow representatives who testified presented conflicting and often incredible testimony. The court went on: "Lacey was impermissibly subjected to an uncomfortable and sometimes unfair working environment, but such behavior does not rise to the level of a Title VII violation." *Id.* at 3a-4a.

The standard set by the court below was that there was no violation of Title VII unless the petitioner proved that "a reasonable employee in Lacey's shoes would . . . have felt *compelled* to resign." *Id.* (Emphasis in the original.) Furthermore, both the trial court and the court of appeals used as the basis of their decisions the analysis set out in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). App. pp. 2a and 33a-34a. In other words, the courts decided the case based on an analysis to be used in the absence of direct evidence of discrimination. In the present case, however, there was direct evidence of discriminatory intent and, indeed, the Magistrate Judge found that there was such discrimination and that it affected the terms and conditions of petitioner's employment. Thus, the proper analysis should have been based on this Court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1984).[3] By couching the analysis in *McDonnell Douglas* terms, the courts below came to the erroneous conclusion that there had been no violation of Title VII even where there had been racial discrimination in the terms and conditions of employment.

Thus, this case presents an important issue relating to the proper interpretation of Title VII that this Court has yet to address:[4] where there has been discrimination

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[3]The Magistrate Judge cited *Thurston* in a footnote, but interpreted it as applying only where there has been a "statement or a written document showing discriminatory motive on its face." App. p. 34a, n. 7.

[4]In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 233 n.1 (1989), the Court noted that the lower courts held that the failure to reconsider the plaintiff for a promotion to a partnership constituted constructive discharge. Similarly here, petitioner had ample basis to believe that he would not be promoted and that, in fact, respondent was attempting to get rid of him. The employer in *Price Waterhouse*, however, did not contest the holding of constructive discharge in this Court.

prohibited by the statute and when an employee leaves employment because of that discrimination, what relief is appropriate to deal with the established violation of the law. Petitioner respectfully suggests that the writ of certiorari should be granted to provide guidance to the lower courts on this important question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

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APPENDIX

FILED
FEB. 26 1993

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-3725
Summary Calendar

BERTRAM E. LACEY,

Plaintiff-Appellant,

VERSUS

THE DOW COMPANY, d/b/a
DOW CHEMICAL U.S.A.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA-89-793-B

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Bertram Lacey sued the Dow Company alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. Based on *Patterson v.*

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[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

McLean Credit Union, 491 U.S. 164 (1989), the district court dismissed his § 1981 claim. A magistrate judge then considered Lacey's Title VII claim, and the district court ultimately adopted the magistrate's recommendation that judgment be entered in favor of Dow. Lacey appeals this judgment.

I. FACTS

Bertram Lacey worked for the Dow Company as an engineer from 1982 until 1988. He complains that two men who held higher positions within Dow, Andy Rolfe and John Monroe, criticized him, devalued the quality of his work, and evaluated his work harshly solely because of his race. Lacey contends that the poor work evaluations he received caused him to believe that pursuing his career at Dow was futile and he would never be promoted. He alleges that Rolfe and Monroe's behavior amounted to a constructive discharge, in essence forcing him to resign. One month later, Lacey enrolled in medical school.

II. STANDARD OF REVIEW

We review the magistrate's factual findings under the same standard as a district court's factual findings; we will accept the magistrate's factual findings unless they are clearly erroneous. *See Vaughn v. Edel*, 918 F.2d 517, 520 (5th Cir. 1990) (citing *Carter v. South Central Bell*, 912 F.2d 832, 841 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2916 (1991); Fed.R.Civ.P. 52(a).

III. APPLICABLE LAW

To establish a *prima facie* case under Title VII, Lacey must prove that (1) he is a member of a protected group; (2) he was qualified for the job he held; (3) he was [actually or constructively] discharged; and (4) after his discharge, Dow filled his position with a person who is not a member of the protected group. *Norris v. Hartmarx Specialty Stores, Inc.*, 913 F.2d 253, 524 (5th Cir. 1990).

The magistrate found that Lacey was a member of a protected group, was qualified for the job he held, and that Rolfe rated Lacey's work poorly because he was black. The magistrate then noted that Rolfe's poor ratings alone did not cause Lacey to be passed over for any promotions at Dow. The fatal blow to Lacey's case, however, was the magistrate's determination that Lacey's working conditions would not have caused a reasonable employee in his position to feel compelled to resign.[2] Thus, Lacey had failed to prove by a preponderance of the evidence that he had been constructively discharged, and therefore did not establish a *prima facie* violation of Title VII.

1. Was Lacey Constructively Discharged?

Lacey was constructively discharged only if his working conditions were so intolerable as to cause a reasonable employee in his position to resign. Lacey contends that he "felt compelled to resign because his personal and professional self-esteem were undermined and because he had to endure harassment, lies and race discrimination." In support of his argument, he points to the magistrate's findings that Rolfe assessed his work harshly because he was black and that other Dow supervisors relied on Rolfe's tainted assessment of him. Finally, he claims that he had no choice but to resign before his personnel file unjustifiably reflected even more negative assessments of his work.

Our review of the magistrate thorough and detailed record supports Lacey's allegations in part; Lacey was undoubtedly the subject of racial discrimination by Rolfe, if not by other Dow employees. Furthermore, Dow

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[2]An employee has been constructively discharged if the employer made his working conditions so intolerable that a reasonable employee would have felt he was forced into an involuntary resignation. *Bourque v. Powell Electrical Mfg. Col*, 617 F.2d 61, 65 (5th Cir. 1980).

representatives who testified before the magistrate presented conflicting and often incredible testimony. Lacey was impermissibly subjected to an uncomfortable and sometimes unfair working environment, but such behavior does not rise to the level of a Title VII violation.

We agree with the magistrate and the district court that a reasonable employee in Lacey's shoes would not have felt *compelled* to resign. As the magistrate correctly found, at the time Lacey resigned he was faced with trying to correct or overcome his poor employee evaluations by showing they were impermissibly influenced by racial discrimination. He could have filed a complaint with the Equal Employment Opportunity Commission, and he did not need to resign from Dow to do this.[3] More importantly, the fact that he enrolled in medical school soon after leaving Dow indicates that he wanted to pursue a new career in medicine rather than continue his career at Dow. In short, Lace failed to prove by a preponderance of the evidence that he was constructively discharged, and has therefore failed to establish a *prima facie* case of racial discrimination under Title VII of the Civil Rights Act of 1964.

IV. CONCLUSION

For the foregoing reasons, the district court's judgment in favor of Dow is AFFIRMED.

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[3]Lacey filed his complaint with the Equal Employment Opportunity Commission three weeks after notifying Dow of his resignation.

FILED
JULY 20, 1992

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

BERTRAM E. LACEY

VERSUS

CIVIL ACTION
NO. 89-793-B

THE DOW COMPANY, d/b/a
DOW CHEMICAL U.S.A.

OPINION

After independently reviewing the entire record in this case and for reasons set forth in the Magistrate Judge's Report to which objections were filed:

IT IS ORDERED that judgment be rendered in favor to the defendant dismissing the plaintiff's complaint. Judgment shall be entered accordingly.

Baton Rouge, Louisiana, July 20, 1992.

s/ Frank J. Polozola
UNITED STATES DISTRICT JUDGE

FILED
JULY 20, 1992

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

BERTRAM E. LACEY

VERSUS

CIVIL ACTION
NO. 89-793-B

THE DOW COMPANY, d/b/a
DOW CHEMICAL U.S.A.

JUDGMENT

For the written reasons assigned:

IT IS ORDERED that judgment shall be rendered in favor of the defendant and against the plaintiff dismissing this suit with prejudice.

Baton Rouge, Louisiana, July 20, 1992.

s/ Frank J. Polozola
UNITED STATES DISTRICT JUDGE

FILED
AUGUST 17, 1992

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

BERTRAM E. LACEY

VERSUS

CIVIL ACTION
NO. 89-793-B

THE DOW COMPANY, d/b/a
DOW CHEMICAL U.S.A.

AMENDED JUDGMENT

For the written reasons assigned:

IT IS ORDERED that judgment shall be rendered in favor of the defendant and against the plaintiff dismissing this suit with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff shall pay the costs of the transcript for the Special Master's Report as part of the costs in this case.

Baton Rouge, Louisiana, August 14, 1992.

s/ Frank J. Polozola
UNITED STATES DISTRICT JUDGE

FILED
July 17, 1991

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

BERTRAM E. LACEY

VERSUS

CIVIL ACTION
NO. 89-793-B

THE DOW COMPANY, d/b/a
DOW CHEMICAL U.S.A.

SPECIAL MASTER'S REPORT

This matter is before the court following an evidentiary hearing held before the magistrate judge sitting as a special master pursuant to 42 U.S.C. §2000e-5(f)(5).

Plaintiff Bertram E. Lacey brought this action pursuant to Title VII of the Civil Rights Act, 42 U.S.C. §2000e, *et seq.*, alleging discrimination on the basis of race. In his charge of discrimination filed with the Equal Employment Opportunity Commission (EEOC), he complained that he was forced to resign from his job as a process engineer with Dow, that he was told he could not compete with other process engineers at Dow, and that Dow's harassment, intimidation and denial of promotions forced him to resign. Bow denied that it discriminated against the plaintiff based on his race or engaged in any other improper actions whatsoever toward the plaintiff. Defendant contended that the plaintiff voluntarily resigned and was not the subject of a constructive discharge.

REVIEW OF THE EVIDENCE

Plaintiff's articulate and detailed testimony stands in stark contrast to the vague, confusing and contradictory testimony given by the plaintiff's supervisors at Dow. In very large part, their testimony was simply not credible. The following review of the testimony is not intended to point out every instance where a witness' testimony was either corroborated or contradicted by that of another witness or by the documentary evidence. Significant testimony, whether corroborative or contradictory, is presented.

Dwight Fontaine was the plaintiff's immediate manager for a short period while the plaintiff worked in process engineering. Fontaine did not have much opportunity to directly supervise the plaintiff. When he issued his evaluation report of the plaintiff on June 17, 1986, which covered the previous 12 months, he had been the plaintiff's supervisor only four to six weeks. His report was primarily based on information obtained from other sources and the observations of the senior people working in process engineering. Fontaine testified that Dow expected its technical people, such as the plaintiff, to be capable of operating on their own after three to five years experience, but they could seek the help of senior people in that department if help was needed.

Fontaine explained that even though the plaintiff had received a 2-C rating in 1985 and again in 1986, this did not mean that the plaintiff was on his way out of the company. A 2-C rating meant that the plaintiff's opportunities for promotion would come more slowly and would be fewer overall. Dow's employee eva'uation mechanism required the employees in the same categories to be ranked against each other. This was described by Fontaine as a "forced rating" system. The employees in the group were spread out among the various rating categories according to fixed percentages. This necessarily resulted in only a few people being placed in the highest category, a few in the lowest, and the bulk of

the employees in the middle categories. So, even though the plaintiff was considered to be a good engineer, he still might be given a lower ranking compared to others in the same ranking group.

Plaintiff presented one tape recording of a meeting he had with Fontaine. Exhibit P-48. During that conversation, Fontaine explained to the plaintiff that technically he was as good as any other employee Dow had. But the plaintiff sometimes had difficulty in determining when to conclude a project and "tie a knot around it." Fontaine also told the plaintiff that he had scheduling and time management problems. Fontaine did not believe that the plaintiff would have been sent back to process engineering, after his stint in production at the vinyl-2 plant, if the people in process engineering did not perceive the plaintiff's return as a plus for project engineering.

In contrast to his testimony at the trial, at this meeting Fontaine told the plaintiff that the

> ability to know when to call it quits has nothing to do with being a good engineer. We have several people with that same characteristic, to want to do something completely, perfectly, absolutely correct. That's a normal characteristic. You've actually got to fight it to survive in that world out there. The good engineer concept is not focused. I know Andy [Rolf] had to believe that.

Arthur Bourg was a 30-year Dow employee. He was the production supervisor at the vinyl-2 plant and supervised the plaintiff for approximately six months in mid-1987. Of all the Dow employees who testified, Bourg's testimony was the least helpful in terms of presenting clear, factual information. On the other hand, listening to Bourg provided the clearest picture of the situation the plaintiff must have been trying to deal with at Dow during the year prior to his

leaving Dow. Although Bourg assigned the plaintiff various tasks, Bourg testified he was not "per se" the plaintiff's supervisor.

According to Bourg, the plaintiff's performance was below average. However, this assessment is simply not supported by Bourg's testimony. Bourg compared the plaintiff to five other employees, who are all white. Bourg stated that the plaintiff had problems with his productivity and accuracy, but did not recall anything specific. Although he had kept notes on the plaintiff's performance, he later destroyed them when the plaintiff returned to process engineering. And although he had notes, Bourg did not remember bringing the notes to several meetings with John Monroe another supervisor, although he could have.

Bourg was questioned extensively regarding Exhibit P-8, notes of a meeting held October 16, 1987. This meeting was between Bourg and Andy Rolf. The meeting notes were prepared by Rolf, but Bourg acknowledged that they accurately reflected the discussion at the meeting.

Bourg was cross-examined about the specific projects noted. It was apparent from his answers that he had very little factual knowledge about the details of the projects. For example, Bourg reported to Rolf that the plaintiff used the wrong stream analysis in the CMP-vinyl throx cross-tie project. But Bourg did not know that the plaintiff obtained the supposedly incorrect data from one of the senior employees who had been moved from vinyl-2 to process engineering. Bourg did admit that this employee had more experience that the plaintiff and that his reliance on the information from the senior employee was not unreasonable.

A second example of Bourg's lack of information was his testimony regarding the tox-throx global technology review. According to Rolf's notes, Stan Cole, another supervisor, reviewed the information, pointed out that there was some errors in the information but the plaintiff did not go back and correct the errors before he made his

presentation. Rolf also reported that the plaintiff "went outside the company, paid for having a model of a mixing box made, and used it in his presentation. Art said that Bert [Lacey] was told afterward that the expense had not been approved, and Art said Bert never asked for a refund of his money." But under cross-examination, Bourg acknowledged that his information about this event could be faulty. Nevertheless, he was confident that the plaintiff did not correct the errors.

Other testimony, primarily that of the plaintiff and Stan Cole, showed just how wrong, or at least misleading, this report was. There were errors in the prepared slides. But by the time Cole reviewed the presentation it was too late to prepare corrected slides. Instead, the plaintiff was instructed that he could make the corrections orally at the presentation itself. So, although it may be true that the errors were not corrected on the slides before the presentation, Bourg's report leaves the clear impression that the errors were not corrected at all. Furthermore, Bourg's testimony that the plaintiff did not correct the errors was directly contradicted by the plaintiff. Plaintiff testified that Bourg could not know whether the errors were corrected orally at the presentation because he was sleeping during the presentation. When Bourg was questioned about whether he slept through the presentation, he said he did not think so. Since it was apparent that Bourg's testimony was questionable from the outset, he was closely observed. When asked this question his face flushed bright red.

As noted above, Bourg also reported to Rolf that the plaintiff had a model of a mixing box made for the presentation. The sense of Rolf's report was that the plaintiff had expected to be reimbursed for the expense but his reimbursement request was refused. Plaintiff testified, however, that he never intended that he would be reimbursed for the expense. He always intended to keep the box as his own property, and therefore paid the cost of it himself. When questioned whether Bourg thought having a

display box made for the presentation demonstrated the plaintiff's enthusiasm, Bourg stated that it did indicate the plaintiff's "zest" for his job, but nevertheless Dow did not feel it was needed.

A third example also is helpful in understanding why the plaintiff complained about receiving mixed signals from his supervisors. Although Rolf's notes report that Bourg was complimentary of the plaintiff's performance, the notes also indicate Bourg's assessment that the plaintiff took about three times as long to complete the project as he should have. But on cross-examination Bourg testified that he never recalled telling the plaintiff that the project should also take one week. Bourg did not know what other projects the plaintiff was working on during the same time. Bourg did not know whether the plaintiff was also conducting recruiting activities on behalf of Dow on college campuses. Bourg did acknowledge that Dow's college recruiting efforts were important to Dow. Although Bourg and the plaintiff supposedly met almost daily on this project, it seems incredible that Bourg would never have told him that the project should be completed in a week if that really was the case.

Overall, Bourg's testimony indicates that he assessed the plaintiff's performance based on incomplete and inaccurate data, and reported that assessment incompletely and inaccurately as well. While he may have had expectations which the plaintiff did not meet, he did not communicate those expectations to the plaintiff. Rather, it appears that Bourg routinely communicated the expectations to the plaintiff's supervisors, but never told the supervisors that the plaintiff had not been informed of these expectations.

Rolf stated in his meeting notes, Exhibit P-8 regarding the D-235 replacement, that the plaintiff was unavailable for a test which caused delay in the project. Although it was not necessary to have anyone from Dow

witness the test, the plaintiff wished to do so for his own professional development. He was given permission to do so. Bourg reported to Rolf that the plaintiff could not be found when it was time to conduct the test. Yet, Bourg testified that he made this report without speaking to any representative of the contractor. Rolf's notes make it seem as though the plaintiff was at fault.

Plaintiff testified that he did make arrangements with the contractor to observe the test at a specific time. Plaintiff called the contractor when the appointed time arrived, but the contractor was not prepared to do the test at that time. An alternative time was agreed upon. When the alternative time arose, the contractor was still not prepared. Plaintiff testified that he told the contractor representative that when the test was ready, to call the plaintiff at work; but if the plaintiff was not available at that time then the contractor should proceed with the test without him. Despite these instructions, the contractor held off performing the test until a Dow representative could be contacted. Clearly, the plaintiff was not at fault in causing any delay on this project.

Robert G. Hewitt was Dow's counseling specialist. He was involved in human resources projects and career counseling. He has been at Dow for 33 years. He is a white male.

After the plaintiff began experiencing problems with his supervisors, he was directed to meet with Hewitt to discuss his problems. Plaintiff met with Hewitt on several occasions, beginning in late 1987.

Prior to learning at the hearing that some of his conversations had been recorded, Hewitt testified that he did not recall talking with John Monroe about the plaintiff, nor did he recall discussing with the plaintiff any proposal which might make it easier for the plaintiff to find a job elsewhere. Hewitt did not recall discussing with the plaintiff anything about race or age discrimination.

Hewitt reviewed his notes made during meetings with the plaintiff on September 10 and 22, December 17, 1987, and March 9, 1988. He attested to the accuracy of the notes and that he would have made the notes the same day as the meeting, or the next day. On cross-examination Hewitt was unable to provide any details about the negative comments made regarding the plaintiff's performance. Hewitt's notes indicated that Kent Kerr and John Monroe believed the plaintiff may have had communication problems and may not have understood what was expected of him. Yet Hewitt testified he was not sure what Kerr or Monroe meant by the latter remark. Regarding the comment about communication problems, Hewitt testified that he was not aware of a communication problems with Rolf or that Rolf had caused. Hewitt did not recall speaking with anyone else about Rolf being a problem. Hewitt also testified he was not aware of Rolf's ability as a supervisor and did not have any basis to judge Rolf's technical skills. Hewitt did not recall expressing any opinion to the plaintiff about Rolf's technical skills.[1]

Hewitt acknowledged that he was not aware of John Monroe's attitude regarding the plaintiff's supervisors. Hewitt acknowledged that Monroe relied on Rolf for information about the plaintiff. Hewitt did not know if Rolf or Monroe had a problem communicating.

Plaintiff introduced transcripts of two conversations with Hewitt in early March, 1988. Exhibits P-43 and 44. Plaintiff met with Hewitt on March 9, 1988. Plaintiff discussed his problems at work as well as his personal problems. By that time the plaintiff was seriously considering leaving Dow and was becoming "disheartened

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[1] This testimony was given before Hewitt was aware of the contents of the tape recorded conversations he had with the plaintiff in March, 1988, but after he knew that at least some conversation had been recorded. Hewitt's statements during those recorded conversations directly contradict his evidentiary hearing testimony on these points.

about engineering." Hewitt advised the plaintiff regarding the availability of financial assistance from Dow. More significantly, Hewitt told the plaintiff about problems he, Hewitt, had experienced with Andy Rolf:

> I'll be honest with you, I've had problems with Andy. I'm just gonna be upright, honest with you. You know I kinda felt ah . . . maybe Andy said some things at times he didn't really mean, but he was the type of person that kinda talked right off the top of his head. He didn't weigh what he said or stop to think about what he was saying and this disturbed some people. And the other thing is that I don't think Andy particularly gave people a lot of coaching and feed back. Hey that's not a good situation. And that's why I asked John [Monroe] to get involved. I got this funny feeling inside me about the way Andy deals with people. And ah . . . I hate like the devil that happened to him[2] but; nevertheless, to be honest with you I still have to say I think Andy had superior technical skills[,] I think his people skills weren't as fin[e] as these.

Exhibit P-43, p. 4.

Although the plaintiff characterized Hewitt's suggestions as urging the plaintiff to leave Dow, this conversation overall can also be interpreted as just a frank discussion with the plaintiff about his career if he decided to stay at Dow and what his options were if he decided to leave.

The second conversation with Hewitt occurred on March 11, 1988. Exhibit P-44. The tenor of this

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[2] Andy Rolf had died prior to this conversation.

conversation was essentially the same as that at the March 8, 1988 meeting. After the plaintiff advised Hewitt of the inconsistent and conflicting assessments of his performance by his supervisors, Hewitt told the plaintiff the following:

> I can understand and relate to your feelings. I think Dow is a good company, but I think there are some shortcomings within Dow. I think Dow is not an ideal company for everybody. My main concern is that we not let this happen for 15 to 20 years. A much older person does not have the option to go out and look for another job. We like to say that there is no age discrimination in the work place. Well that's baloney, there is! It's just like any other discriminatory practice. We say it's not there, but it is. It's a fact we may not like to admit it, but it's true. The age difference is the same thing.
>
> I'll be honest with you. If I were you I would have to make the decision to go elsewhere. I would think that a person with your background and personality would do well in technical sales. Let me know how I can help you.

At the evidentiary hearing Hewitt denied that we had seen any discrimination, racial or otherwise, at Dow and had not heard any direct complaints about discrimination from any black employees. He did acknowledge that there was some hearsay about race-based complaints. Hewitt also denied that there was any age discrimination at Dow.

Realizing that credibility of the witnesses would be important in this case, Hewitt was observed carefully during his testimony. When Hewitt made these statements denying racial or age discrimination at Dow, his face flushed.

Hewitt was also questioned about Rolf's use of the term "boy" to describe black employees generally and the plaintiff particularly. Quite surprisingly for a counseling specialist, Hewitt testified that he could not say how the use of that term would be perceived. Nevertheless, he could not think of any circumstances under which the plaintiff could be referred to as a "colored boy" and the plaintiff would not take offense.

It is more probable that Hewitt's statements made in his recorded conversations with the plaintiff accurately reflect the true state of affairs than this testimony given under oath in court. Plaintiff never mentioned race or age discrimination in either recorded conversation. It was Hewitt who brought up the subject of discrimination. Quite understandably, Hewitt would never admit, privately or publicly, that Dow had ever discriminated on the basis of race, age or otherwise. Yet, Hewitt was dealing with a likeable, talented person who was also one of the few black engineers at Dow. Since Hewitt's job was to counsel employees who were leaving Dow, voluntarily or otherwise, he would want to make that transition as smooth as possible. If Hewitt believed that Dow wanted the plaintiff to terminate his employment, would not conveying this to the plaintiff in a sympathetic rather than a confrontational manner be the better course to follow? Hewitt's statements about discrimination at the time and in the manner in which they were made could easily be understood by the plaintiff as telling him that Dow was discriminating against him because of his race, but that it would be best for the plaintiff's career in the long run if he would leave Dow voluntarily. That interpretation is supported not only by Hewitt's testimony, but by that of Calvin McClinton and Eugene Williams, who are both black. Hewitt's in-court explanations of the recorded statements made on March 9, and 11, 1988, are weak and unpersuasive.

Calvin McClinton was the Equal Employment Opportunity manager for the Louisiana Division of Dow

since 1979. He has been employed at Dow for 19 years. McClinton discussed the plaintiff's employment problems with Hewitt during the latter part of the plaintiff's employment.

McClinton's testimony regarding Rolf's dealings with the plaintiff was confusing. McClinton stated that a previous complaint against Rolf for a racial remark had been investigated. This apparently was in relation to a complaint made by Eugene Williams. No discrimination was found. Then McClinton testified that he did not remember a complaint by Williams alleging that Rolf had referred to him, Williams, as "boy." He did hear about this, he stated, but not from Williams. Nevertheless, Rolf supposedly was counselled about using the term "boy." McClinton added that Rolf commonly used this term with everyone he worked with. Then McClinton said that he actually did not know if Rolf used the term "boy" but the complaint about the use of the term was investigated anyway. Rolf was counselled not to use that term.

McClinton did not recall ever mentioning to the plaintiff several specific cases of race-related problems concerning other Dow employees. Nor did McClinton recall ever discussing with the plaintiff his own opinion about Rolf as an individual or a supervisor. He particularly did not recall a conversation that occurred on February 1, 1989.

Unknown to McClinton, the plaintiff had recorded his meetings with McClinton on that date and on March 11, 1988. The recording of those meetings was introduced into evidence. Exhibit P-45. McClinton told the plaintiff that his was about the fourth case he had seen of Dow trying to get rid of people. McClinton formerly worked for Les Louviere, a white employee at Dow. McClinton described him as a racist. According to the tape recording, McClinton told the plaintiff of another Dow employee who referred to McClinton as "nigger this, nigger that." McClinton had gotten so upset about this that he feared that if he did not

control his own conduct he would lose his job. McClinton told the plaintiff that he thought he would kill the employee. McClinton assessed the plaintiff's circumstances in the following manner: "[The] handwriting is on the wall, to me. Bert Lacey will not be [accepted] at process engineering anywhere else at Dow. Pack your bags and go get you another opportunity."

Like Hewitt, McClinton's disavowals or lack of recollection of his remarks during these conversations was unpersuasive.[3]

McClinton was also questioned about a conversation he had with the plaintiff and Williams on February 4, 1987 in McClinton's office. McClinton did not recall the conversation. When asked whether he used the term "master's house" in a reference to the process engineering department and the term "the fields" as a reference to the vinyl-2 plant, McClinton testified that he could have used these terms, but not with the plaintiff. In contrast to what McClinton told the plaintiff on February 1 and March 11, 1988 about Les Louviere and the other employee, at the evidentiary hearing McClinton testified that there was no concrete evidence of misconduct by either of these individuals. These incidents would have occurred in the latter 1960's and Dow had undergone many changes and improvement in its race relations since then, McClinton testified. Today, McClinton stated, such complaints would be thoroughly investigated as was done in the plaintiff's case.

When Rolf's use of the word "boy" came to his attention, McClinton testified, he questioned Rolf about it. Rolf admitted that he did use the word but that he used it with all employees. Rolf agreed that in the future it would

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[3] Although counsel for the defendants was given an opportunity to review the tape recordings of the conversations with McClinton, counsel chose not to question McClinton about the statements he made during those two conversations.

not happen again and to McClinton's knowledge it never did. In McClinton's view, the plaintiff's transfer from process engineering to the vinyl-2 plant and the enhanced supervision of his job duties was a genuine effort by Dow to improve the plaintiff's performance and retain him as an employee. Yet, when questioned about the details of his investigation of the plaintiff's complaint regarding Rolf, McClinton admitted that he chose to believe the plaintiff's supervisors and the documentation in the plaintiff's file. If that documentation was incorrect, then so was his conclusion that there was no racial animus involved, McClinton stated.

McClinton also testified about prior layoffs at Dow. He acknowledged that in late 1986 the Dow Louisiana Division had been instructed to layoff a certain number of employees. John Monroe submitted a list of possible employees for layoff. Since the list contained a disproportionate number of blacks, McClinton stated that he got involved in this process so as to prevent this from occurring. He estimated that 35 to 40 percent of the employees on the original list were blacks, but he did not recall the actual number of employees involved.

Eugene Williams has worked for Dow 25 years. At the time of the hearing he was a block supervisor and had held that position approximately seven years. He was also an area Equal Employment Opportunity Coordinator. Williams assisted McClinton in the investigation of the plaintiff's complaints. Williams testified that he talked to many people during the investigation. He questioned the plaintiff's supervisors, Rolf and Monroe. He did not talk to Art Bourg or Stan Cole. He spoke to the plaintiff about keeping his options open and about leaving Dow. He could find no proof that the plaintiff's treatment was because of race. According to Williams, the plaintiff believed that Andy Rolf was racially biased. But it was quite surprising to hear Williams testify that he, as an EEO officer supposedly investigating the plaintiff's complaints, did not talk to Rolf about the plaintiff's allegation against him. Although

Williams acknowledged that such an allegation was a serious one, he only spoke to Rolf about the plaintiff's performance. Yet, strangely again, Williams testified that he never doubted the plaintiff was telling the truth.

Williams' testimony is also troubling because he apparently held the personal belief that there was a racial problem between Rolf and the plaintiff. Nevertheless, because Rolf did not openly confess to it, Williams believed there was little or nothing he could do.

Williams was asked particularly about a conversation on February 4, 1988 which took place at Calvin McClinton's office in the presence of the plaintiff. This was the conversation which had references to the "master's house" and the "fields." Williams did not recall the conversation. Nor did he recall any remark during the conversation to the effect that Dow was not able to get rid of all the black employees it wanted to in the 1986 layoffs.

Nor did Williams recall a conversation that occurred on May 18, 1988 which took place in Williams' office trailer. Even when he was asked specific questions, premised on detailed statements supposedly made during his conversation, Williams still testified that he did not recall the conversation. Unknown to Williams, the plaintiff had recorded this conversation as well. Exhibit P-46. Williams told the plaintiff that the plaintiff had been "put in harm's way" and that "somebody's got to plan." Williams acknowledged his belief that he himself was the subject of age discrimination at Dow, but because he had only three years left before retirement he had chosen to do nothing about it. Williams believed that Dow wanted to move its younger employees up in the rankings so as to advance them. Williams was content to let Dow "do what they got to do to me."

Regarding the plaintiff particularly, Williams stated during this conversation that "John Monroe talks out of both sides of his mouth," Williams believed that Dow "couldn't

lay [the plaintiff] off because [Dow] didn't have their s[ ] together," didn't have the necessary documentation. Plaintiff had "too many bright spots." Williams observed that the same people that gave the plaintiff verbal praise for his work at the vinyl-2 plant had given directly contradictory written statements. According to Williams, "the handwriting [was] on the wall - these people intend to get you out of Dow Chemical one way or the other." They were not going to promote the plaintiff and there was nothing he could do. This was because Dow supervisors had made decisions, written letters and told Calvin McClinton. It was now "impossible for [the supervisors] to say they made a mistake; [they were] now not going to all get together and say we [messed] up and Bert is the greatest."

Williams concluded the conversation with a remark about a former Dow employee named Hardison: "I told that to your boy Hardison, he didn't understand that, and they took him down the hard way."

Like Hewitt and McClinton before him, Williams' attempt to explain away these comments or cast them in a different light was unconvincing. Williams testified that he had no authority to talk to Bourg about the plaintiff's problems. Yet, he also testified that his function was to assist in the investigation of the plaintiff's complaints and that he had talked to many people including Rolf, John Monroe, and Jim Wilkes, to whom Monroe reported.

Williams' testimony displayed an attitude of acceptance or racial discrimination in the work place. This attitude is not troubling in view of the fact that Dow has assigned him the duties of an Equal Employment Opportunity Coordinator. Williams testified that he did not believed the supervisors, Rolf and Monroe, would ever say they were discriminating against the plaintiff. Had they done so, he was sure they would not admit it. Yet, Williams believed racial discrimination existed at Dow and that an employee affected by it needed to do what he could to get

past it - and, as he testified, anyone who believed otherwise was a fool.

Even highly placed Dow supervisory people were not aware of or were unsympathetic towards race-based decision making by lower level Dow supervisors. James E. Campbell has been employed by Dow for more than 34 years. He is the manager of human resources, governmental affairs and the Equal Employment Opportunity supervisor. He was the most highly placed Dow employee to testify at the evidentiary hearing. He testified that Dow takes complaints of any discrimination very seriously and assigns them the highest priority. In the case of the plaintiff, he directed that McClinton and Williams investigate the allegation against Rolf. Campbell was satisfied, based on his confidence in Bourg and Monroe, that their reports about the plaintiff's performance were accurate and valid.

Yet it was very surprising when Campbell testified that he had only learned of the plaintiff's complaints of race discrimination two to three weeks prior to the evidentiary hearing.[4] Although Campbell went through a lengthy explanation of his reasons for concluding that the criticism of the plaintiff's job performance was valid, his reasons can be distilled to this: he trusted people who trusted people who trusted people who trusted Andy Rolf and Art Bourg. According to Campbell, neither Monroe nor McClinton gave him any indication of any personality conflict between the plaintiff and his supervisors. But Hewitt told the plaintiff that Andy Rolf had problems communicating and McClinton had expressed to the plaintiff his very negative opinion about

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[4] Plaintiff made it very clear in his resignation letter, Exhibit P-1, that his leaving Dow was in large part based on its tolerance of racial discrimination by its managers. Apparently whatever investigation Campbell relied upon in reaching his conclusions, the investigation was so shallow that it did not even reveal the source of the plaintiff's belief that Dow would "tolerate racial discrimination in its managerial ranks."

Rolf, both professionally and personally. The investigation of the plaintiff's charge of discrimination filed with the EEOC, according to Campbell, took only a couple of hours; a 30 to 45 minute meeting with Monroe, and a little longer one with McClinton. Monroe could not think of any evidence of racial discrimination. Campbell could not explain how Monroe could know anything about the plaintiff's complaints of racial discrimination, nevertheless, he was comfortable that Monroe had sufficient knowledge to conclude that the complaints were not based in fact. Campbell offered similar testimony with regard to Bourg, Rolf, McClinton and Williams.

It might be argued that the statements made by Williams and McClinton to the plaintiff during the recorded conversations were simply their unsophisticated attempts to sympathize with the plaintiff and boost his morale during what was obviously a very difficult time for him. By blaming the plaintiff's supervisors for creating the circumstances which led the plaintiff to ultimately leave Dow, and making it seem that race discrimination was behind it, Williams and McClinton could be supportive of the plaintiff's own high assessment of his professional skills. After all, there was substantial objective and subjective evidence that the plaintiff was a skilled engineer. Additionally, Williams himself testified that he was told "white lies," but not to hurt someone. He testified that he lied to the plaintiff to enhance the plaintiff's self-esteem. He would do it for others, and for himself, but, he added, not to protect his job or retirement. He described his comments to the plaintiff during their recorded conversation as foolishness, but acknowledged that racism is not foolishness.

Dow apparently agrees that racism is not foolishness since McClinton and Williams had the responsibility to investigate complaints of racial discrimination in their roles as EEO supervisors. Campbell testified that Dow does not place minorities in symbolic roles, but rather places them in important positions.

Plaintiff began his relationship with Dow as a summer intern. He became a permanent employee in February 1982 and thereafter was rated on an annual basis. His first four ratings were good. John Monroe gave him his fifth rating, a 2-C. He received his second 2-C rating from Dwight Fontaine. When he received his third 2-C rating, by Andy Rolf, the plaintiff questioned it. He had not done so before. When he discussed this rating with Rolf, plaintiff testified, Rolf was careful to point out that the low rating was not because the plaintiff was a "colored boy."

Plaintiff discussed his low rating with McClinton and Williams at the February 4, 1988 meeting in McClinton's office. It was at this meeting, plaintiff testified, that McClinton offered his assessment of the plaintiff's transfer to vinyl-2. According to the plaintiff, McClinton laughed and said the plaintiff had been in the "master's house" and Dow wanted him "in the fields," doing production work. Williams said at the meeting that Dow wanted to better its case to get rid of the plaintiff. Dow did not yet have the necessary documentation it would need to do that. McClinton also informed the plaintiff during this meeting about the 1986 layoffs. A list was circulated of the employees to be laid off, but the list initially had 30 to 40 percent black employees. McClinton told the plaintiff that it was through his influence that the list was changed to reflect the percentage of black employees in the work force.

Plaintiff testified regarding the review of the projects listed in Bourg's October 16, 1987 meeting notes. Exhibit P-8. Suffice it to say that the plaintiff offered ample, credible testimony to establish that the negative comments about his job performance were misleading, and in some instances inaccurate.

Plaintiff was told on August 21, 1987 that he was going to be returning to process engineering. He continued to work on projects at vinyl-2 in the meantime. He physically returned to process engineering in October.

Rolf's comments about the plaintiff's performance were increasingly negative. Plaintiff testified that Rolf continuously told the plaintiff he was not criticizing the plaintiff because the plaintiff was a "colored boy." Rolf's criticism of the plaintiff's performance is reflected in meeting notes and correspondence in October 1987. Exhibits D-18, D-19, D-20 and P-36 (P-36 also contains a copy of D-20).

After the plaintiff received the October 30, 1987 letter, Exhibit P-36, the plaintiff spoke with Rolf only in passing. Plaintiff testified that Rolf was largely unresponsive to the plaintiff's explanations of what Rolf perceived to be poor performance. Plaintiff emphasized that whenever he spoke with Rolf, he never raised the subject of race or discrimination; it was always Rolf who brought race into the conversation.

After Rolf died in January 1988, the plaintiff believed that things would change. Plaintiff had perceived Rolf as the cause for his low ratings. But, plaintiff testified, things did not change. It was after Rolf died that Monroe told the plaintiff to talk with Hewitt and McClinton. Plaintiff interpreted Hewitt's remarks during the March 9 and 11, 1988 conference as an acknowledgment that age and race discrimination was a fact of life and that if the plaintiff did not like it, maybe he should look elsewhere for employment. Hewitt, during his testimony, tried to explain that his remarks were a reference to discrimination in society and the work place generally, and not particularly at Dow. Hewitt testified that he had read articles in different magazines and in other literature in his office about age and race discrimination. But in contrast to Hewitt's testimony, the plaintiff testified that he saw no magazines in Hewitt's office.

By mid-December 1987 the plaintiff had already been seriously considering leaving Dow and in fact had interviewed with one company. Monroe encouraged the

plaintiff to stay at Dow. Although he did not know it then, plaintiff testified, he later learned that process engineering had a backlog of projects which the plaintiff was capable of performing. Thus, the plaintiff concluded that Monroe's encouragement to remain at Dow was not for the plaintiff's benefit but was for the benefit of Dow.

Plaintiff continued to look for other employment by responding to newspaper ads and sending resumes to other companies. Plaintiff also pursued furthering his education and becoming a doctor. Prior to his leaving Dow in May, 1988, the plaintiff had applied for and been accepted to a medical school in late April 1988. Nevertheless, the plaintiff still thought he might be able to improve his situation at process engineering. Plaintiff testified that he spoke to Monroe on May 12, 1988 about remaining at Dow for another year, saving his money, and then perhaps going back to school. Monroe, the plaintiff testified, told the plaintiff that he could work for three months, just showing up and work with Bob Hewitt to find other employment outside Dow. By now the plaintiff had serious concerns about how sincere Hewitt would be in helping the plaintiff find other employment. He was also aware of the negative information contained in his personnel file and was afraid that it might be passed on to other prospective employers if Hewitt was involved in finding new employment for the plaintiff. Plaintiff testified that he became so frustrated about his employment problems, which were compounded by personal problems, that he was about to pass up the opportunity to attend medical school.

Analysis of the Evidence and Findings of Fact

The applicable law discussed below sets out the elements the plaintiff must prove to establish his claim. It also directs the court's attention to those factual matters which must necessarily be determined.

Much of the testimony was in direct conflict. Even testimony not directly contradicted could support opposing

inferences. There was substantial uncontradicted testimony that the plaintiff was a good engineer and a good employee. He was qualified for the job he held. Because of Dow's forced rating system, even good engineers had to be rated lower than some of their peers. Lower rated employees would have fewer promotions during their career. There would be a longer interval between the promotions as well. Lower rated employees were likely to receive fewer cash awards also. However, the evidence did not support a finding that the plaintiff was actually denied any promotions for which he was eligible. It is clear that Dow did not actually terminate the plaintiff's employment.

Did Dow deliberately make the plaintiff's working conditions so intolerable that he was forced to resign?

There was no direct, credible evidence that anyone other than Andy Rolf allowed race to influence his decision making. The evidence as a whole supports a finding that Rolf communicated poorly on a person-to-person basis with the plaintiff. Information about the plaintiff's job performance was negatively slanted and misleading. When the plaintiff was reported to have performed a project well, Rolf converted positive, complimentary statements into a begrudging concession of the plaintiff's competence. The evidence also supports the conclusion that Rolf reacted negatively when the plaintiff challenged Rolf's criticisms. Rolf had to have known that the plaintiff's job performance evaluations would carry significant weight with senior supervisory personnel at Dow. And because of his long tenure with Dow, Rolf's assessments and evaluations would be given more weight than the plaintiff's explanations or justifications.

This view of Rolf's conduct is supported by the testimony of Hewitt, McClinton and Williams. Privately, all three made statements to the plaintiff confirming what the plaintiff strongly suspected: the course of any communication problem lay with Rolf and not the plaintiff,

and that Rolf was treating the plaintiff more harshly than other employees under his supervision because the plaintiff is black. There is sufficient credible evidence in the record to support a finding that Rolf rated the plaintiff lower because of his race.

There is little evidence to support a finding that Bourg was also motivated by race. Unfortunately, despite his long experience, Bourg demonstrated a marked inability to communicate effectively where the plaintiff was involved. This shortcoming was compounded by the influence the plaintiff's race played in Rolf's treatment of the plaintiff.

But were the employment conditions, overall, so difficult or unpleasant that a reasonable person in the plaintiff's shoes would have felt compelled to resign? In addition to the SMRJ[5] rating Rolf gave the plaintiff in 1987, and its implications regarding the plaintiff's likelihood of future promotions at Dow, there were other conditions affecting the plaintiff's employment.

During late 1987 and early 1988 the plaintiff was convinced that he was being discriminated against on the basis of race. Bob Hewitt had all but admitted that race and age discrimination existed in the work place, at least generally, but that it would never be admitted. Under the circumstances, the plaintiff could easily take this to mean, and did take it to mean, that discrimination was occurring at Dow, but Dow would never acknowledge it and therefore never take appropriate steps to correct it.

More significantly, the plaintiff had met with McClinton and Williams, two black males which Dow had placed in positions to investigate Equal Employment Opportunity complaints. Their remarks were not "white lies" as Williams tried to portray them. They were serious comments about past and present racial discrimination at

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[5] Sometimes Meets Requirements of the Job.

Dow, which the plaintiff would have been expected to, and did, take seriously. These two black men told the plaintiff, essentially, that Dow was aware of and tolerant of racial discrimination at its Louisiana facility. Furthermore, the record supports the conclusion that a person in the plaintiff's position would understand that the attitude of acknowledgment and acquiescence in racial discrimination at Dow meant that he could not expect Dow to help correct the negative perception created by Rolf's 1987 employee evaluation or remedy race-based decision making generally.

Plaintiff had been encouraged by only one supervisor, Monroe, to stay at Dow. That encouragement was not so much to help the plaintiff but rather was to further Dow's interest in having some projects completed. Three other Dow supervisory personnel who Dow told the plaintiff to meet with, Hewitt, McClinton and Williams, were basically telling the plaintiff that he should leave because nothing he could do would change anything. Although Dow employees testified at the evidentiary hearing at a low rating meant fewer and less frequent promotions and not necessarily that the plaintiff would be terminated, the plaintiff could "see the handwriting on the wall." Dow was building its case to support terminating the plaintiff and his only realistic alternative was to leave before his personnel record contained so many damaging comments and evaluations that his chances for future employment in the engineering field were all but eliminated.

On the other hand, the record does support a finding that a reasonable employee in the plaintiff's position would have filed a complaint with the EEOC prior to his leaving Dow. Only one Dow supervisor, Rolf, had let race enter into his decision making process. Other supervisors, namely, Bourg, Monroe and Fontaine, had relied on either superficial, incorrect or incomplete information when evaluating the plaintiff. The reports and other information were not obviously tainted by racial factors. By December 1987 the plaintiff had already been giving serious

consideration to employment outside Dow or changing careers entirely. The source of race-based decision making, Rolf, had died in early 1988. Although the comments of Hewitt, McClinton and Williams may be indicative of Dow's attitude regarding race discrimination, none of them were responsible for the plaintiff's employee evaluations. They contributed to the overall working conditions, in the sense that they led the plaintiff to believe that Dow as aware of and insensitive to racial discrimination, but there was no evidence to suggest that they had any real ability to influence the plaintiff's job performance evaluation.

Thus, prior to when he left Dow, the plaintiff was faced with trying to correct or overcome his poor employee evaluations through showing that they were influenced by an impermissible - racial - factor. It is clear that he did not need to leave Dow in order to attempt to do this. He could have filed an EEOC complaint while at Dow. This is amply demonstrated by the fact that he did file an EEOC complaint on June 2, 1988 just three weeks after informing Dow of his intention to resign. Dow did not delay in providing the EEOC with its version of the events. Its position statement is dated June 22, 1988.

That the EEOC took more than a year to complete its investigation does not support a contrary finding. The EEOC investigation may have taken a different course if the plaintiff had made the EEOC aware of the tape recorded conversations; apparently he did not do so. Had the plaintiff filed and pursued an EEOC complaint before resigning, the fact that the investigation may not have been concluded timely might then have supported a later decision to resign and a subsequent finding that a later resignation was not unreasonable.

Here, the plaintiff was pursuing a career change rather than pursuing remedies available to him under Title VII to correct any prior discriminatory actions which might have been taken against him. In other words, the record

supports a finding that the plaintiff chose to leave Dow when he did, before filing a charge of discrimination, because he wanted to avail himself of the opportunity to attend medical school rather than continue at Dow. There is nothing in the record to support a finding that the plaintiff would have been precluded from entering medical school at a later date. While there was some testimony by the plaintiff that he might return to engineering sometime in the future, there was no evidence or argument that the plaintiff wanted to be reinstated to his former position at Dow.

Applicable Law

In passing Title VII Congress made it clear that "sex, race, religion, and national origin" were not relevant to the selection, evaluation, or compensation of employees. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 1784 (1989); *Vaughn v. Edel*, 918 F.2d 517, 520 (1990). The law applied in a Title VII disparate treatment case is well established. *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 1824 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981). In a typical disparate treatment discharge case, the plaintiff establishes a prima facie case[6] by showing that (1) he is a member of a protected group; (2) he was qualified for the job that he held; (3) he was discharged; and (4) after his discharge the employer filled his position with an individual who was not a member of the protected group. *Vaughn*, *supra*, at 521. No evidence was presented that Dow replaced or planned to replace the plaintiff after he left Dow's employment. Therefore, in this case the fourth element is more appropriately, (4) that after the plaintiff's discharge others were not members of the protected class

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[6] The specification of the prima facie proof required is not necessarily applicable in every respect to differing factual situations. *McDonnell Douglas*, *supra*, at 1824, n. 13.

remained in similar positions. *Id.*[7]

Once the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the adverse job action. The employer's burden is one of production, not persuasion. *Burdine, supra*, at 1095. If the employer satisfies its burden of production the presumption disappears and the plaintiff is required to prove by a preponderance of the evidence that the legitimate non-discriminatory reason proffered by the employer was not the true reason for the adverse employment decision. *Id.* Plaintiff may satisfy this burden by persuading the court that a discriminatory reason more likely than not motivated the employer or by showing that the employer's reason is unworthy of belief. *McDaniel v. Temple Independent School District*, 770 F.2d 1340, 1346 (5th Cir. 1985).

Plaintiff claimed that Dow discriminated against him and constructively discharged him in May of 1988. The general rule on constructive discharge is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into involuntary resignation, then the employer has constructively discharged the employee and is liable for the conduct just as if it had formally discharged the employee. *Boze' v. Branstetter*, 912

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[7] The *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination. When direct credible evidence of employer discrimination exists, such as a statement or a written document showing discriminatory motive on its face, the defendant can counter the direct evidence only by showing by a preponderance of the evidence that they would have acted as they did without regard to the plaintiff's race. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 621-22 (1984); *Guillory v. St. Landry Parish Police Jury*, 802 F.2d 822, 824 (5th Cir. 1986), *cert. denied*, 482 U.S. 916, 107 S.Ct. 3190 (1987); *Vaughn, supra*, at 521.

F.2d 801, 804 (5th Cir. 1990);[8] *Jurgens v. EEOC*, 903 F.2d 386, 390 (5th Cir. 1990). The Fifth Circuit in *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980), specifically endorsed a "reasonable-employee" test.[9] In order to find that an employee has been constructively discharged the trier of fact must be satisfied that the working conditions would have been so difficult or

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[8] In *Boze'* the plaintiff, a black attorney for Chevron, claimed racial discrimination and a constructive discharge. Plaintiff claimed that Branstetter had behaved in a racist manner toward him during one assignment and that Branstetter assisted his supervisor in preparing a performance evaluation criticizing his work. Later Branstetter directly supervised the plaintiff and plaintiff alleged that Branstetter criticized his performance without knowing anything about his professional activities. After one critical performance evaluation Branstetter placed the plaintiff on probation and informed the plaintiff that if he failed to improve the company would have no alternative but disciplinary action, including discharge. Boze' also claimed that Branstetter let this evaluation be known to the company's general and associate general counsels. Plaintiff's formal response to the evaluation was treated as a grievance. At a later meeting the plaintiff was removed from probation by Branstetter. Nevertheless, the plaintiff resigned a little over two weeks later. Under the circumstances of *Boze'*, the Fifth Circuit found that a reasonable employee instead of resigning would have first pursued either the company's internal grievance process or filed a complaint with the Equal Employment Opportunity Commission. *Boze'*, *supra*, at 804-05.

[9] The EEOC has endorsed an objective test, requiring the charging party to prove only that the employer made working conditions so intolerable that a reasonable person would have been forced to resign. Under the EEOC's test the charge party must establish (1) that a reasonable person in the charging party's position would have found the working conditions intolerable; (2) that conduct which constituted a Title VII violation against the charging party created the intolerable working conditions; and (3) that the charging party's involuntary resignation resulted from the intolerable working conditions. B. Schlei & P. Grossman, *Employment Discrimination Law*, 268-69 n. 55 and 56.

unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. *Id.* The burden is on the employee to prove constructive discharge and the employee must show aggravating factors, aside from the underlying discriminatory act to establish constructive discharge. *Jurgens, supra,* at 393; B. Schlei & P. Grossman, *Employment Discrimination Law* 268, n. 44.[10] Aggravating factors include hostile working conditions and any other evidence suggesting any invidious intent on the part of the employer in creating or perpetuating the intolerable conditions compelling retirement or resignation. Manifestations of the apparent intent of the employer are relevant to this analysis. *Jurgens, supra,* at 393, n. 10, *citing* Note, *Choosing a Standard for Constructive Discharge in the Title VII Litigation,* 71 Cornell Law Review 587, 606-607, 609-610 (1987). However, the determinative factor is not the employer's intentions, but the effect of the conditions on a reasonable employee.[11]

Only equitable relief is available under Title VII. *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988); *Tilley v. Anthony M. Frank, Postmaster General,* 728 F. Supp. 1293 (M.D. La. 1990). The object of that equitable relief under 42 U.S.C. §2000e-5(g) is to restore the victim of discrimination to fruits and status of employment

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[10] In *Boze'* and *Bourque* the Fifth Circuit rejected the argument that requiring employees suffering illegal discrimination to seek redress while remaining in their jobs would go against the policies served by Title VII. The court's reasoning was based on the fact that Title VII itself accords legal protection to employees who oppose unlawful discrimination and the belief that society and the policies underlying Title VII are best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships. *Boze', supra,* at 805; *Bourque, supra,* at 66.

[11] *Jeff [sic] v. Dallas Independent School District,* 798 F.2d 748, 755 (5th Cir. 1986), *modified,* 491 U.S. 701, 109 S.Ct. 2702 (1989); *Kelleher v. Flawn,* 761 F.2d 1079, 1086 (5th Cir. 1985).

as if there had been no discrimination. *Bennett, supra.* A plaintiff may recover equitable relief, such as an injunction against the unlawful employment practice, or affirmative action, including, but not limited to, reinstatement with or without back pay. *Tilley, supra.*

In determining a claimant's entitlement to back pay, the constructively discharged employee's efforts to mitigate his damages must be considered. In *Floca v. Homecare Health Services, Inc.*, 845 F.2d 108, 112 (5th Cir. 1988), the court cited with approval the Eleventh Circuit decision in *Miller v. Marsh*, 766 F.2d 490, 492 (11th Cir. 1985), and the Tenth Circuit case of *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 268 (10th Cir. 1975) ("[W]hen an employees opts to attend school, curtailing present earning capacity in order to reap greater future earnings, a back pay award for the period while attending school also would be like receiving a double benefit.") When a person removes himself from the job market by entering school full time he is no longer available for employment. Thus, he cannot mitigate his damages. Similarly, where an employer discriminatorily denies a promotion to an employee, that employee's duty to mitigate damages encompasses remaining on the job. *Bourque, supra*, at p. 66.

Conclusions

Plaintiff's race was a significant factor in the 2-C rating given to him in 1987 by Andy Rolf. This was the plaintiff's third 2-C rating in three years. Rolf's rating alone did not cause the plaintiff to be passed over for any promotions or be denied any cash awards.

Plaintiff's decision to question Rolf's evaluation began a chain of events which ultimately led to the plaintiff's resignation. Understandably - and correctly - the plaintiff concluded that Rolf gave him a 2-C rating because he was black and that Dow would never voluntarily acknowledge it.

On the other hand, the plaintiff is an intelligent, personable and educated individual. He had the skills and opportunity to change careers by attending medical school. This would certainly not foreclose forever the possibility of him returning to engineering, or even combining engineering and medicine in one career. The decision to attend medical school must certainly be viewed as a major career change.

As noted in *Bourque*, *supra*, the policies underlying Title VII are best served if, wherever possible, the unlawful discrimination is attacked within the context of the existing employment relationship. Plaintiff chose to attend medical school rather than pursue Title VII remedies while remaining at Dow. While it can be argued that a reasonable employee, under all of the circumstances, would have seized the opportunity to attend medical school and thereby escape his tormentors, that choice cannot be deemed reasonable when the policies underlying Title VII are also considered. *See*, *Bourque*, *supra*, at pp. 65-66 (rejecting the argument that to require employees suffering illegal discrimination to seek redress while remaining in their jobs would contravene the policies served by Title VII because then only "foolhardy" victims would seeks relief from discrimination).

The actions of Hewitt, McClinton and Williams, viewed in the context of the plaintiff's overall working conditions subsequent to the evaluation by Rolf, could be construed as "aggravating factors" evidencing an intent on the part of the employer to perpetuate intolerable conditions. *Jurgens*, *supra*, at 393, n. 10. They did nothing to attempt to remedy the evaluation by Rolf even when they were aware that the evaluation might have been more harsh because the plaintiff is black. However, the discriminatory actions of Rolf and the subsequent conduct of Hewitt, McClinton and Williams cannot be viewed separately or in isolation, but must be examined in the context of the reasonable-employee test of *Bourque*. Hewitt, McClinton and Williams were not the plaintiff's supervisors and would have had no authority to rate his subsequent job

performance.

Application of the reasonable employee test supports the conclusion that the plaintiff failed to prove by a preponderance of the evidence that the working conditions was such that a reasonable employee in his position, under all of the prevailing circumstances and considering the purpose of Title VII, would have felt compelled to resign. Thus, his resignation was not a constructive discharge.

Although the plaintiff demonstrated that he is a member of a protected group and was qualified for the job he held, he did not prove he was discharged and, accordingly, is not entitled to relief under Title VII. Likewise, the plaintiff failed to prove that he was denied any promotions or other job benefits on account of illegal racial discrimination by Dow.

Plaintiff is not entitled to monetary relief under Title VII in the form of back pay or front pay even if he had been discharged. Plaintiff presented no evidence that he attempted to mitigate damages after his resignation. The evidence showed that the plaintiff had been accepted to medical school and enrolled in medical school shortly after leaving Dow. He remained in medical school through the date of the hearing. Plaintiff removed himself entirely from the engineering job market by entering medical school. Because the plaintiff failed to adequately mitigate his damages, he would not be entitled to an award of back pay; because he enrolled full time in medical school he would not be entitled to an award of front pay either. Reinstatement was not sought by the plaintiff. The preponderance of the evidence demonstrated that no relief would be available to the plaintiff under Title VII. *See, Bennett, supra.*

RECOMMENDATION

It is the recommendation of the magistrate judge sitting as a special master that judgment be rendered in favor of the defendant dismissing the plaintiff's complaint.

Baton Rouge, Louisiana, July *17*, 1991.

s/_____
UNITED STATES MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
JUN 25 1993
OFFICE OF THE CLERK

No. 92-1923

(2)

In The

Supreme Court of the United States

October Term, 1992

BERTRAM E. LACEY

Petitioner,

versus

THE DOW COMPANY, D/B/A/
DOW CHEMICAL U.S.A.

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT THE DOW CHEMICAL COMPANY

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June 25, 1993

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QUESTIONS PRESENTED

1. Would a reasonable employee who has been subject to no disciplinary action feel compelled to quit his job because he has been unsuccessful in attempting to get his employer to change marginal performance appraisals?

2. Even if the Civil Rights Act of 1991 applies retroactively, does a plaintiff alleging discrimination have any cognizable claim for compensatory and punitive damages when he has not filed a timely action under 42 U.S.C. §1981, and he has offered no proof of any acts of discrimination occurring within 180 days prior to the filing of an EEOC charge?

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No. 92-1923

In The

Supreme Court of the United States

October Term, 1992

BERTRAM E. LACEY

Petitioner,

versus

THE DOW COMPANY, D/B/A/
DOW CHEMICAL U.S.A.

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT THE DOW CHEMICAL COMPANY

STATEMENT OF THE CASE

In the action below, Lacey alleged that The Dow Chemical Company (hereinafter "Dow") discriminated against him on the basis of his race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq.[1] Lacey also alleged that Dow violated 42

[1] Pursuant to Supreme Court Rule 29.1, Appendix A lists the parent company and non-wholly owned subsidiaries of The Dow Chemical Company.

U.S.C. §1981. Lacey alleged that he was forced to terminate his employment as a result of the unlawful behavior of Dow and its employees, Lacey's supervisors and fellow employees.

The district court dismissed Lacey's §1981 claim based on *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The Magistrate Judge heard Lacey's Title VII claim, rendering a Special Master's Report, which the district court adopted in its entirety, entering judgment in favor of Dow.

Lacey appealed the decision of the district court to the U.S. Fifth Circuit Court of Appeals, which rendered its opinion, without oral argument, on February 26, 1992, affirming the decision of the district court. The Fifth Circuit, among other reasons, held that Lacey was not constructively discharged and did not prove a *prima facie* case of racial discrimination under Title VII of the Civil Rights Act of 1964 against Dow. Lacey filed a *pro se* motion for extension of time in which to file for a rehearing, which was granted by the Fifth Circuit. Lacey then filed a motion for rehearing, which was denied on May 27, 1993. Lacey's petition for writ of certiorari was filed on May 27, 1993 in this Court.

SUMMARY OF ARGUMENTS FOR DENYING WRIT

I. Petitioner does not challenge the standard that the district court and the Fifth Circuit used to conclude there was not a constructive discharge, but merely disputes the application of the constructive discharge standard to the facts in this case. This challenge of facts to

applicable settled law is not a valid reason for the U.S. Supreme Court to grant a writ of certiorari.

II. Petitioner does not correctly state the issue of constructive discharge in this case.(Petitioner's Brief at pp. 11-12) There was no finding by any of the lower courts that the petitioner resigned because of discrimination, but that he voluntarily resigned for other reasons.

III. Should this Court find that the Civil Rights Act of 1991 applies retroactively to the petitioner's purported claim under 42 U.S.C. §1981, the petitioner's claim under §1981 was time-barred when filed and should therefore not be considered.

IV. Should this Court find that the Civil Rights Act of 1991 applies retroactively to the petitioner's purported claim under Title VII, petitioner would still have no claim for compensatory and punitive damages because no act, other than petitioner's voluntary resignation, is alleged to have occurred within the 180 day time period prior to petitioner's filing of his charge of discrimination with the Equal Employment Opportunity Commission.

ARGUMENT

I. Petitioner does not challenge the standard that the district court and the Fifth Circuit used to conclude there was not a constructive discharge, but merely disputes the application of the constructive discharge standard to the facts in this case. This challenge of facts to applicable settled law is not a valid reason for the U.S. Supreme Court to grant a writ of certiorari.

Rule 10 of this Court's rules provides that "[a] petition for writ of certiorari will be granted only when there are special and important reasons therefor." There are no special and important reasons justifying this Court's review of the lower courts' decisions in this case. Both courts below applied the facts in this case to the existing settled law with regard to constructive discharge. Only if this Court is interested in reviewing that standard should certiorari be granted.

As early as 1975, the Fifth Circuit Court of Appeals enunciated the standard in the circuit for finding constructive discharge by an employer. This standard has been followed consistently. *Jurgens v. E.E.O.C.*, 903 F.2d 386 (5th Cir. 1990), *Boze' v. Branstetter*, 912 F.2d 801 (5th Cir. 1990). The standard is generally if "the employer deliberately makes an employee's working conditions **so intolerable** that the employee is **forced** into involuntary resignation, then the employer has consummated a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee." *Jurgens*, 903 F.2d at 390; *Boze'*, 912 F.2d at 804 (emphasis added.)

In order for the plaintiff to prove what conditions are necessary to effect a constructive discharge, the Court in *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61 (5th Cir. 1980) established the following as the "reasonable employee" test:

> To find constructive discharge we believe that 'the trier of fact must be satisfied that the . . . working conditions would have been so difficult or unpleasant that a **reasonable person** in the employee's shoes would have felt compelled to resign.' (quoting *Alicia Rosado v. Garcia Santiago*, 562 F.2d 114 (1st Cir. 1977)). (emphasis added).

The Fifth Circuit has been helpful in defining who is a "reasonable employee." *Jurgens*, 903 F.2d at 390. Under this definition, for the plaintiff to have shown in this case that his resignation was made necessary by his working conditions, he would have had to show that a **reasonable person** would have felt that his actions were warranted by the circumstances. Plaintiff himself testified, at length, about his obsession with his job and job performance at Dow. In *Jurgens*, the Court found that "a simple discriminatory denial of promotion that cannot be reasonably construed as a **career-ending action** can not alone create such embarrassment or humiliation that the denial comprises a constructive discharge." The Court also found " . . . expectation of future discrimination in promotion involved a highly speculative forecast and, therefore was not an aggravating factor." *Jurgens*, 903 F.2d at 392. (emphasis added.)

In the present case, the evidence was undisputed that the plaintiff was never denied a promotion: he was well-paid and, consistently received pay increases; he was

never involuntarily transferred; he was never demoted; he was never threatened with termination. Indeed, when he announced his intent to resign, his supervisor encouraged him to stay with Dow. Clearly, a reasonable person would not feel **compelled** to quit under these circumstances. Plaintiff contends only that he received job evaluations which were less than he thought he deserved and that when he complained about the appraisals, they were not changed. These facts do not create the type of work environment which would cause a reasonable person to feel forced to quit.

In order for the plaintiff to have shouldered his burden with regard to showing a constructive discharge, he would have had to show that the workplace was intolerable because of the racial discrimination and animus that was practiced by his employer.

It is submitted that in this case, the plaintiff's working conditions were not intolerable, and thus he had a duty to act as a reasonable employee. Under the conditions, in *Boze', supra,* which are factually similar to this case, the Court found that a reasonable employee would have done one of two things prior to resigning, to mitigate his damages: – 1 – he could have completed the internal grievance process; and/or – 2 – he could have filed an E.E.O.C. complaint while retaining his job. As in *Boze',* plaintiff in this matter did not pursue filing a complaint with the E.E.O.C. while retaining his employment. The Court stated as follows:

> We have held that employees who oppose unlawful discrimination best serve the policies underlying Title VII that accords them legal protection, if they attack that discrimination

"within the context of existing employee relationships" *Bourque*, 617 F.2d at 66.

Plaintiff in this matter had the option to file a charge with the Equal Employment Opportunity Commission without resigning his job, and without fear of retribution therefor. He failed to pursue that option, and so cannot now say that he had no reasonable option but to resign.

II. Petitioner does not correctly state the issue of constructive discharge in this case. (Petitioner's Brief at pp. 11-12) There was no finding by any of the lower courts that the petitioner resigned because of discrimination, but that he voluntarily resigned for other reasons.

The Special Masters Report, which was generated by the Magistrate Judge and included in the Appendix to plaintiff's petition clearly enunciates the reasons he, as trier of fact, believed that petitioner resigned from his position at Dow. At pages 32a and 33a of petitioner's brief, the Magistrate Judge opined as follows:

> Here, the plaintiff was pursuing a career change rather than pursuing remedies available to him under Title VII to correct any prior discriminatory actions which might have been taken against him. In other words, the record supports a finding that the plaintiff chose to leave Dow when he did, before filing a charge of discrimination, because he wanted to avail himself of the opportunity to attend medical school rather than continue at Dow. There is nothing in the record to support a finding that the plaintiff would have been precluded from entering medical school at a later date. While there was some

> testimony by the plaintiff that he might return to engineering sometime in the future, there was no evidence or argument that the plaintiff wanted to be reinstated to his former position at Dow.

Thus, although plaintiff suggests that "this case presents an important issue [concerning constructive discharge] that this Court has yet to address". (Plaintiff's brief at 11-12), The issue articulated by plaintiff is not present in this case because he did not quit his job at Dow due to discrimination. He resigned because he wanted to pursue a career change and attend medical school. His attempt to raise an important legal issue is, therefore, based on facts not present in this case. And since he does not challenge the legal standard for constructive discharge applied by the lower courts, but rather only the application of facts to that standard, plaintiff has raised no issue warranting this Court's exercise of its discretionary review power.

III. Should this Court find that the Civil Rights Act of 1991 applies retroactively to the petitioner's purported claim under 42 U.S.C. §1981, the petitioner's claim under §1981 was time-barred when filed and should therefore not be considered.

Plaintiff also attempts to raise an important legal issue concerning the retroactive effect of the Civil Rights Act of 1991, an issue which this court has already agreed to resolve in *Landgraf v. USI Film Industries,* No. 92-757 and *Rivers v. Roadway Express;* No. 92-938. However, the Court's resolution of that issue in *Landgraf* and *Rivers* would have no effect on this case.

Petitioner resigned from his position with Dow in May, 1988. His petition was filed in the district court on October 19, 1989, approximately 17 months after his resignation. The law is clear that the time limits for filing a Section 1981 action are governed by the most analogous state statute of limitations. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). In Louisiana, the one year prescriptive period applicable to tort actions applies to actions brought under Section 1981. *See, e.g. Jackson v. PALA, Inc.*, 621 F. Supp. 1119 (M.D. La. 1985), *aff'd*, 787 F. 2d 586 (5th Cir. 1986); *Charles v. National Tea Co.*, 488 F. Supp. 270 (W.D. La. 1980); *Doucette v. Barthelemy*, 598 So.2d 600 (La. App. 4th Cir. 1992). The courts have also held that the filing of a charge of discrimination with the EEOC generally does not interrupt or toll the statute of limitations or prescriptive period on a Section 1981 action. *See Johnson, supra*, 421 U.S. at 465-66; *Charles, supra* 488 F. Supp. at 274: "The timely filing of an employment discrimination charge with the EEOC pursuant to Title VII of the Civil Rights Act does not toll the running of the limitation period applicable to an action based on the same facts brought under 42 U.S.C. §1981."

Thus, even should this Court conclude that the Civil Rights Act of 1991 is to be applied retroactively, the petitioner has no valid claim in this case under 42 U.S.C. §1981.

IV. Should this Court find that the Civil Rights Act of 1991 applies retroactively to the petitioner's purported claim under Title VII, petitioner would still have no claim for compensatory and punitive damages because no act, other than petitioner's voluntary resignation, is alleged to have occurred within the 180 day time period prior to petitioner's filing of his charge of discrimination with the EEOC.

In Louisiana, which is a nondeferral state, a charge of discrimination must be filed with the EEOC within 180 days after the alleged act of discrimination occurred. 42 U.S.C. §2000e-5(e)(1).

As this Court indicated in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977), any act which is not made the basis of a timely charge of discrimination is nothing but "an unfortunate event in history which has no present legal consequences." There is no basis in evidence in this matter to conclude that there was any event which violated petitioner's rights under Title VII of the Civil Rights Act within the 180 days immediately preceding the filing of his charge with the EEOC on June 2, 1988. In fact, petitioner's former supervisor, Andy Rolf, whom the magistrate found was the only person who could have racially discriminated against the petitioner died in early January, 1988. At the time of his death Rolf was no longer the petitioner's supervisor. The only events reference in the Magistrate-Judge's report which occurred within the 180 day period were efforts by Dow co-employees to encourage and sympathize with petitioner's perceived problems. Therefore, even should this Court decide that the Civil Rights Act of 1991 should be applied retroactively, there is no "employment decision" adverse to the

petitioner occurring within the 180 day time period prior to his filing of an EEOC claim which would give rise to a compensable claim under Title VII.

Additionally, if this Court should find that the Civil Rights Act of 1991 is to be retroactively applied, it is respectfully submitted that petitioner has no claim for punitive and emotional distress damages. Under the provisions of the Civil Rights Act of 1991, compensatory and punitive damages are only recoverable under Title VII "provided that the complaining party cannot recover under section 1981 of this title." 42 U.S.C. §1981a(a)(1). Therefore, if the Civil Rights Act of 1991 applies retroactively, petitioner herein could have pursued remedies under §1981 and Title VII if he had filed his claims timely. His failure to file his Section 1981 claim timely should not prejudice Dow, and he cannot claim compensatory and punitive damages under Title VII based on the specific language of the Civil Rights Act of 1991 specifying that such damages are not available under Title VII when they could have been recovered in a §1981 action.

CONCLUSION

It is respectfully submitted that this case is not appropriate for the grant of a writ of certiorari for the reasons enunciated above. However, should this Court be inclined to grant the writ, and only in that instance, Dow would acquiesce in the stay of these proceedings pending the Court's resolution of the issues presented in *Landgraf*

v. USI Film Industries, No. 92-757 and *Rivers v. Roadway Express*, No. 92-938.

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Attorneys for The Dow Chemical Company

APPENDIX A

SUBSIDIARIES OF THE DOW CHEMICAL COMPANY

The following lists all companies in which The Dow Chemical Company has effective ownership of 50% or more of the voting securities. Not all of these companies are considered "significant subsidiaries" of The Dow Chemical Company for purposes of Rule 1-02(v) of Regulation S-X, nor are all "controlled" by The Dow Chemical Company.

The Dow Chemical Company:
- Admiral Equipment Co.
- Admiral Equipment Japan Ltd.
- Arabian Chemical Company Limited (1)
- AWD Technologies, Inc.
- Boride Products, Inc.
- Compagnie des Services Dowell Schlumberger S.A. (2)
- DC Partnership Management Inc.
  - DowBrands L.P. (12)
- DCOMCO, Inc.
- DCU/LB TRUST (1)
- DVCA-21 Holding, C.A.
  - Dow Venezuela, C.A.
    - CV Services Ltd.
- Destec Energy, Inc.
  - Destec Holdings Inc.
  - Destec Ventures, Inc.
  - Louisiana Gasification Technology, Inc.
- Dexco Polymers (1)
- Dow A.G.
  - Dow Benelux Holding N.V.
    - Dow Benelux N.V.
      - Rofan Automation and Information Systems B.V.
    - Polyol International B.V.

Polyol Belgium N.V.
Dow Belgium
Dow Chemical Iberica S.A. (11)
DowBrands Espanola S.A.
Dow Danmark A/S
Dow Europe S.A.
Chimtrade (1)
Dow Export S.A.
Dow Turkiye A.S. (5)
Dow Hellas A.E.
Dow International Service Center N.V. (3)
Dow Norge A/S
Dow Turkiye A.S. (5)
Primera-Industria e Comercio Ltda.
Dow Austria Ges. mbH
Dow Chemical (Australia) Limited
Dow Chemical Canada Inc.
Dow Capital B.V.
Dow International Service Center N.V. (3)
Dow Pipeline Ltd.
DowBrands Canada Inc.
Dowell Schlumberger Canada Incorporated (2)
Fort Saskatchewan Ethylene Storage Limited Partnership (1)
Dow Chemical (China) Ltd.
Dow Chemical Company Limited
Cromarty Petroleum Company Limited (1)
Dow Trading Ltd.
Dow Chemical Delaware Corp.
Dow Chemical (Hong Kong) Limited
Dow Chemical Iberica S.A. (11)
Dow Chemical International Inc. (Panama)
Dow Chemical International Ltd.
Dow Chemical Thailand Limited
Dow Portugal, Productos Quimicos, Lda. (10)
Petroquimica-Dow S.A. (Petrodow)
Dow Chemical Japan Limited

Dow Chemical Korea Limited
Dow Chemical (NZ) Limited
Dow Chemical Overseas Capital N.V.
Dow Chemical Pacific Limited
  Ulsan Pacific Chemical Corporation
Dow Chemical (Singapore) Private Limited
Dow Credit Corporation
Dow Deutschland Inc.
  Dow Chemical Inter-American Limited
    Dow Quimica de Colombia S.A. (8)
  Dow Deutschland Anlagen GmbH
  Dow Hungary KFT
  Dow Turkiye A.S. (5)
  DowBrands Europe GmbH
  Epoxital S.R.L. (1)
  Safechem Umwelt Service GmbH
Dow Engineering Company
  Dow Engineering, Inc.
Dow Factoring Company S.A.
Dow Financial Holdings Inc.
  DowBrands L.P. (12)
  Dow Holdings Inc.
    Dow Corning Corporation (2)
    Dowell Schlumberger Corporation (2)
    Dowell Schlumberger Inc. (2)
    Marion Merrell Dow Inc. (9)
Dow France S.A.
  DowBrands France SA
Dow Hydrocarbons and Resources Inc.
  Cayuse Pipeline, Inc.
  Dow Intrastate Gas Company
  Dow Pipeline Company
  Midland Pipeline Corp
    Fort Saskatchewan Ethylene Storage Corporation (1)
  Promix System
Dow International B.V.

Dow Italia S.p.A.
  First Chemical Factoring SpA
Dow Kakoh Kabushiki Kaisha
Dow Mitsubishi Kasei Limited (1)
Dow Portugal, Productos Quimicos, Lda (10)
Dow Quimica Argentina S.A.
Dow Quimica Chilena S.A.
  Anticorrosivos Industriales Limitada (1)
Dow Quimica de Colombia S.A. (8)
Dow Quimica Mexicana S.A. de C.V.
Dow Quimica S.A.
  Dow Productos Quimicos Ltda.
    Mineracao e Quimica do Nordeste S.A.
      Merrell/Lepetit Ind. Comercio de Productos Farmaceuticos de Embalagens e Artefatos Plasticos Ltda. (4)
  Merrell/Lepetit Ind. Comercio de Productos Farmaceuticos, de Embalagens e Artefatos Plasticos Ltda. (4)
    Bramevik Comercio e Participacoes Ltda.
Dow Suomi OY
Dow Sverige AB
Dow Trading S.A.
Dow Turkiye A.S. (5)
Dow-United Technologies Composite Products Inc. (1)
DowBrands Inc.
  DowBrands L.P. (12)
El Dorado Terminals Company (1)
Essex Chemical Corporation
  Pioneer Pharmaceuticals, Inc.
Essex Specialty Products, Inc.
  Essex Specialty Products, Inc. (Canada)
  Expandite Essex Pty Limited (1)
  Gurit-Essex A.G. (2)
Etoxilados del Plata S.A. (1)
FilmTec Corporation

Great Western Pipeline Company, Inc.
Joliet Marine Terminal Trust Estate (1)
Latin American Pharmaceuticals, Inc.
  Laboratorios Lepetit de Mexico, S.A. de C.V.
  Lepetit International Inc.
Liana Limited
  Dorinco Reinsurance Company (1)
  Dorintal Reinsurance Limited (1)
  Timber Insurance Limited (1)
Lucky Epoxy Limited (1)
Marion Merrell Dow Inc. (9)
  Blue Ridge Labs
  Marion & Company
  Marion Merrell Dow (Canada) Inc. (6)
    Merrell Dow Pharmaceuticals (Canada) Inc.
      J.C.P. Laboratories Inc.
    Nordic Laboratories Inc.
      Canada Pharmacal Ltd.
    2862-5473 Quebec Inc.
      Nordic Merrell Dow Research Inc.
  Marisub, Inc.
  Marisub II, Inc.
  Merrell Dow Pharmaceuticals Inc.
    Biochimica Del Salento S.p.A.
    Gruppo Lepetit S.p.A.
      Gruppo Lepetit Trading Srl
      Hammer Pharma S.p.A.
    Marion Merrell Dow Consumer Products
    Marion Merrell Dow (Europe) A.G.
    Marion Merrell Dow Australia Pty. Ltd.
    Marion Merrell Dow (Canada) Inc. (6)
      Merrell Dow Pharmaceuticals (Canada) Inc.
        J.C.P. Laboratories Inc.
      2862-5473 Quebec Inc.
        Nordic Merrell Dow Research Inc.
      Nordic Laboratories Inc.
        Canada Pharmacal

Marion Merrell Dow GmbH
Henning Berlin GmbH (Berlin)
Henning Berlin Anlagen GmbH
Dynopharm GmbH Pharmaceutica
Henning Berlin Biochemie GmbH
Henning Berlin GmbH (Austria)
Marion Merrell Dow K.K
Marion Merrell Dow Limited
MDP (Holdings) Ltd.
Marion Merrell Dow (N.Z.) Limited
Marion Merrell Dow Puerto Rico Inc.
Marion Merrell Dow N.V./S.A.
Marion Merrell Dow S.A.
Merrell Dow France et Cie (SNC)
Marion Merrell Dow S.A.
Merrell Dow Pharmaceuticals International Inc.
Merrell Dow Pharmaceuticals Pacific Limited
Merrell Dow Portuguesa Socieda de Quimica, S.A.
NKY Distribution Center Inc.
P.T. Pacific Indomas Plastic Indonesia (1)
Productos Quimicos Peruanos S.A.
RH Acquisition Corp.
Marion Merrell Dow Inc. (9)
Rofan Services Inc.
Airco Generon Systems LP (1)
DH Compounding Company (1)
DowElanco
DowElanco China Ltd.
DowElanco International Ltd.
Dong Yang Elanco Co. Ltd. (1)
DowElanco Thailand Ltd.
United AgriSeeds, Inc.
DowElanco B.V.
DowElanco Argentina S.A.
DowElanco Australia Limited
DowElanco Canada Inc.
DowElanco Chile S.A.

DowElanco Danmark A/S
DowElanco De Columbia S.A.
DowElanco Export S.A.
DowElanco GmbH
DowElanco Iberica, S.A.
DowElanco Industrial Ltda.
DowElanco Italia S.r.L.
DowElanco Japan Limited
DowElanco Limited
DowElanco Malaysia Sdn Bhd
DowElanco Mexicana, S.A. de C.V.
DowElanco (NZ) Limited
DowElanco Pflanzenschutzmittel Vertriebs G.m.b.H.
DowElanco Pacific Ltd.
DowElanco S.A.
DowElanco Sverige AB
DowElanco Venezuela, C.A.
DowElanco Tarim A.S.
DowElanco Taiwan Ltd.
Elanco Ihara K.K. (1)
P.T. Pacific Chemicals Indonesia
Generon Systems (1)
Generon Systems A.G. (1)
Sumitomo Dow Limited (1)
Taiwan Dow Chemical Limited
Tecnica Petroquimica de Centro America S.A.
Tepeca Sociedad Anonima
The Cynara Company (7)
Zhejiang Pacific Chemical Corporation (1)

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3725

BERTRAM E. LACEY,

Plaintiff-Appellant,

versus

THE DOW COMPANY, d/b/a,
DOW CHEMICAL U.S.A.,

Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Louisiana

ON PETITION FOR REHEARING

(MAY 27, 1993)

Before JOLLY, DUHÉ and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied

ENTERED FOR THE COURT:

/s/ John M. Duhé
United States Circuit Judge

REHG-4

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE

(3)

No. 92-1923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BERTRAM E. LACEY,

Petitioner,

v.

THE DOW COMPANY,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

THE APPLICABILITY OF THE CIVIL RIGHTS ACT OF 1991

Respondent argues that even if the Civil Rights Act of 1991 applies to this case, petitioner has no claim under 42 U.S.C. § 1981 since the complaint was filed outside of the applicable state statue of limitations. However, petitioner's section 1981 claim was not dismissed by the district court on that ground, but rather on the basis of this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

Appendix to Petition for a Writ of Certiorarir (hereinafter "App."), pp. 1a-2a. Therefore, if this Court holds that section 101 of the Civil Rights Act of 1991 applies to cases pending as of the date of its enactment in *Rivers v. Roadway Express, Inc.*, No. 92-938, then the appropriate course would be to vacate the decision below and remand to the court below for consideration in the first instance of the applicability of that decision to the present case.

Similarly, respondent argues that there were no employment decisions adverse to petitioner within the applicable time periods under Title VII of the Civil Rights Act of 1964. However, this was manifestly *not* the basis of the decisions of the courts below denying plaintiff relief under Title VII. The magistrate judge held that petitioner had been discriminated against because of his race in being given a low performance evaluation in 1987 and that petitioner's decision to question that evaluation "began a chain of events which ultimately led to the plaintiff's resignation." App. 37a-38a. Thus, again, if the Court holds, in *Landgraf v. USI Film Products*, No. 92-757, that section 102 of the Civil Rights Act of 1991 applies to cases pending at the time of its enactment, the appropriate action would be to vacate the decision below and remand for consideration of the applicability of that decision to this case.

II.

THE ISSUE OF CONSTRUCTIVE DISCHARGE

Respondent argues that petitioner does not take issue with the legal standard applied by the courts below in deciding the question of constructive discharge. This is manifestly not the case. In the petition for a writ of certiorari, petitioner argues that the courts below were incorrect in deciding the case by using the analysis set out in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). Petition for a Writ of Certiorari at pp. 11-12.

Instead, since here the magistrate judge found direct evidence of intentional discrimination, the proper standard was that set out in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1984). That is, since there was a finding that there was discrimination, there necessarily was a violation of Title VII, and the question was what relief was proper unless the respondent was able to meet the burden of proof required by *Thurston*. *See also*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

This case, therefore, involves an issue closely related to that raised in *Milligan-Jensen v. Michigan Technological University*, No. 92-1214, in which certiorari was granted on June 21, 1993, after the petition for certiorari was filed herein. In both constructive discharge cases such as the present case, and in after-acquired evidence cases such as *Milligan-Jensen*, the lower courts have confused the issue of whether there is *liablity* under Title VII with what *relief* should be granted.

Thus, in the present case the court of appeals held that even though petitioner had been discriminated against in his working conditions, there had been no violation of Title VII because those conditions were not sufficiently intolerable so as to force him to resign. App. p. 3a-4a. In *Milligan-Jensen*, the court of appeals held that since the petitioner would have been terminated if the employer had known about her falsification of her application, it was "irrelevant whether or not she was discriminated against." 975 F.2d 302, 305 (6th Cir. 1992). Other courts of appeals have rejected this rule, holding that in an after-evidence case, the employer should be held liable for violating Title VII, but that the relief the employee may obtain may be limited. *See, e.g.*, *Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (11th Cir. 1992).

Similarly, in a constructive discharge case, the question of whether an employee was justified in leaving because of unlawful discrimination does not even arise

unless there is a finding that such discrimination existed. Thus, the issue raised is properly not whether there has been a violation of Title VII, as the court below erroneously held, but whether the relief the employee may recover is limited because conditions were not so severe as to force a reasonable person to resign rather than stay and fight the unlawful discrimination.

Because of the relevance of the resolution of *Milligan-Jensen* to the issue of constructive discharge presented here, it would be appropriate for the Court to dispose of the petition for writ of certiorari based on its decision in *Milligan-Jense* as well as in *Rivers v. Roadway Express* and *Landgraf v. USI Film Industries*.

Conclusion

For the foregoing reasons, the poetition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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